IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,	)	
Plaintiff,	)	Civil Action No. 00-2041
vs.	)	
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, CHARLES VON BERNUTH and JOHN HERKLOTZ,	)	
Defendants.	)	

DEFENDANT JOHN HERKLOTZ'S MOTION TO OPEN JUDGMENT PURSUANT TO RULE 60(b)

AND NOW, comes Defendant, John Herklotz ("Herklotz"), by and through his attorneys, BURNS, WHITE & HICKTON, LLC, and hereby requests relief from the Order granted by the Honorable Arthur J. Schwab on February 20, 2007 entering judgment against Herklotz and in favor of Plaintiff, WRS, Inc. ("WRS") in the amount of $2,584,749.03, files this Motion for Reconsideration or Relief from Judgment Pursuant to Rule 60, averring as follows:

1. On February 20, 2007, The Honorable Arthur J. Schwab issued a final Order entering judgment against Defendant John Herklotz in the amount of $2,491,981.03 and $92,768.00. On the same day, the Court entered default judgments against Plaza and co-Defendants Charles Von Bernuth ("Von Bernuth") and Eric Parkinson ("Parkinson").

2. The Court then severed and transferred additional cross-claims brought against Von Bernuth and Parkinson, thereby creating a final, appealable order. (Document 141). As a result, Herklotz sought timely review with the United States Court of Appeals for the Third Circuit, and that appeal is pending.

3. On October 16, 2007, Defendant Von Bernuth filed a Motion for Reconsideration or Relief from Judgment.

4. On March 13, 2008, the Honorable Judge Standish issued an Order granting the motions of Von Bernuth, Parkinson and Plaza for relief from default judgment pursuant to Fed.R.Civ.P. 60(b). (Document 194). After reviewing the documents on record in this Court, Herklotz has determined that this new evidence directly impacts the award against him, since a surety or guarantor cannot be liable for more than his principal.

5. Out of fundamental fairness and judicial consistency, Herklotz requests that this Honorable Court open the judgment Judge Schwab entered against him on February 20, 2007. Further, Herklotz requests that this Motion be considered on an emergency basis due to the fact that the Third Circuit oral argument is likely to occur on or about June 6, 2008.

6. Prior to Von Bernuth's filing of his Motion for Reconsideration or Relief from Judgment, Von Bernuth, along with co-Defendants Parkinson and Plaza, was represented by John W. Gibson, Esquire.

7. Von Bernuth's motion requested relief from the default judgment entered against him on February 20, 2007 based on his failure to take action pursuant to this litigation following March, 2006.

8. Von Bernuth's motion was based on the failure of Attorney Gibson to properly and diligently represent him in this case which resulted in the entry of the default judgment.[1]

9. In support of his request for relief, and also key to this Motion, Von Bernuth also set forth facts which show that meritorious defenses exist to WRS's claim against co-Defendants, but also notably to WRS's claim against Defendant Herklotz.

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[1] On January 25, 2008, Plaza and Parkinson filed motions for relief from the default judgments, also based upon the inadequate representation of Attorney Gibson.

10. In Judge Standish's March 13, 2008 Memorandum Opinion accompanying the aforementioned Order of the same date, Judge Standish opined that the defenses elicited by Von Bernuth were potentially meritorious.

11. Because the damages assessed against Herklotz pursuant to the February 20, 2007 Order are based entirely upon the damages allegedly incurred by Von Bernuth, Parkinson, and Plaza guaranteed by Herklotz's suretyship agreement, the defenses recently elucidated by the other Defendants - and considered to be potentially meritorious by Judge Standish - indisputably affect the judgment entered against Herklotz.

12. The evidence proffered by Herklotz's co-Defendants, if presented at trial, may also result in a substantial reduction in the amount of damages recoverable by WRS as to Defendant Herklotz.

13. When arguing against WRS's Motion for Summary Judgment as to damages, Herklotz posited, *inter alia*, that WRS's damages could not be reasonably calculated because proof of damages was muddled and confused due to poor record-keeping, failure to produce documentation, or its inability to produce documentation because records were never maintained in the first instance. Herklotz argued at that time that the damages claimed by WRS against Herklotz could not be calculated to any degree of reasonable certainty.

14. Defendant Herklotz, by virtue of the suretyship agreement he executed for Plaza's outstanding debt to WRS, cannot be held liable for more than the judgments entered against Plaza. *Exton Drive-In, Inc. v. Home Indem. Co.*, 261 A.2d 319 (Pa. 1969); *Rafferty v. Klein*, 100 A. 945 (Pa. 1917), *cited by McShain v. Indemnity Ins. Co. of North America*, 12 A.2d 59,61 (Pa. 1940); *East Crossroads Center, Inc. v. Mellon-Stuart Co.*, 416 Pa. 229, 231 (1969).

15. In light of the opening of the judgment against Plaza, it stands that as a mere surety to Plaza's debt, Defendant Herklotz's alleged damages under the suretyship agreement cannot be determined, and the judgment against him must be opened.

16. The evidence and figures brought to light in Von Bernuth's Motion are new to this litigation, and consequently are new to Mr. Herklotz. Mr. Herklotz did not have the benefit of having this information during the stages of litigation leading up to Judge Schwab's summary judgment entered against him on February 20, 2007.

17. Because this information further corroborates Herklotz's argument that there exists a genuine issue of material fact as to WRS's damages calculations, the February 20, 2007 judgment should be reopened in light of this newly-discovered evidence.

18. The evidence here is not merely cumulative. The evidence provides additional and crucial information which calls into question the very basis for the monetary judgment assessed against Herklotz, whose liability is based upon a personal guarantee of the debt.

19. The evidence cited above was within the knowledge of Eric Parkinson and Charles Von Bernuth, but not brought to the Court's attention as a result of those Defendants' counsel's errors. Herklotz suffered from the negligence of Attorney Gibson as well in this regard.

20. Had Attorney Gibson diligently and properly represented his clients in this matter, this evidence would have known to Herklotz, who would have been able to undertake further discovery in light of this information

21. If the evidence presented by Messrs. Von Bernuth and Parkinson, and Plaza, is accepted by a fact finder, the outcome will most certainly be different for Herklotz as well. Such evidence clearly controverts the evidence presented by WRS as to damages calculations.

22. It is in the interest of justice to Mr. Herklotz to have the judgment against him reopened due to the strong potential that this newly-acquired evidence will at the very least diminish the extremely high monetary judgment assessed against him.

23. Due to the negligence and improper behavior of Attorney Gibson, Von Bernuth, Parkinson and Plaza were never given the opportunity to present the above defenses which may reduce the amount of their damages, and, accordingly, Herklotz's damages.

24. If the Court does not take notice that the evidence elicited by Von Bernuth, Parkinson, and Plaza suffices to vacate the summary judgment against Herklotz, he will face extreme and unexpected hardship. The $2.5 million judgment as it stands against Herklotz, in his individual capacity as surety, has an extraordinarily substantial impact on his personal life and livelihood, and it would be extremely unjust given the newly discovered evidence that the judgment may be for an amount greater than that owed by Plaza.

25. Herklotz requests that this Honorable Court find that the neglect of Attorney Gibson created an extraordinary circumstance in which Herklotz, like his co-Defendants, was denied defenses that create a genuine issue of material fact as to the amount of damages assessed against him based on his alleged liability on the personal suretyship agreement.

WHEREFORE, Defendant John Herklotz respectfully requests that this Honorable Court vacate the judgment entered against him on February 20, 2007 and afford Mr. Herklotz the opportunity to defend his case in light of the new evidence brought forth by Defendants Charles Von Bernuth, or, in the alternative, to defend his case in light of the extraordinary circumstances caused by Mr. Gibson's negligence.

Respectfully submitted,

BURNS, WHITE & HICKTON, LLC

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ORDER

AND NOW, this ___ day of __________, 2008, it is hereby ORDERED that the motion of Defendant John Herklotz for relief from judgment entered against him on February 20, 2007, pursuant to Fed.R.Civ.P. 60(b) is GRANTED.

____
William L. Standish
United States District Judge

CERTIFICATE OF SERVICE

I, David J. Hickton, Esquire, hereby certify that a true and correct copy of Defendant John Herklotz's **Motion to Open Judgment Pursuant to Rule 60(b)** was delivered via first-class mail, postage prepaid on the 6th day of May, 2008, to the following:

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